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In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Appellants and Cross-Appellees,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellee and Cross-Appellant.

On Appeal From The United States District Court For The Central District Of California

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF INTERACTIVE INFORMATION PROVIDERS

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With the consent of the parties, the Association of Interactive Information Providers submits this brief as *Amicus Curiae*. Pursuant to Rule 36.2, copies of the letters of the parties consenting to the filing of this brief have been lodged with the Clerk.

INTEREST OF AMICUS

The Association of Interactive Information Providers is composed of telecommunications companies whose business includes providing *live*, as opposed to recorded, telephone information and entertainment services. The services are provided throughout the United States and in several foreign countries.

The new technology used by *Amicus* companies permits, for the first time ever, a different kind of human interaction – anonymous conversation on topics of personal interest to the caller – that has great public appeal. There is no "alternative means" of engaging in this kind of communication. The telephone, in the privacy of one's home, uniquely offers this opportunity.

Association members provide a wide range of information and entertainment services over telephone lines, typically sharing revenue with the local Bell Operating Companies, which bill and collect the charges for the calls. In some cases, calls are charged by credit card. Association members' live services are of two basic kinds: "chat" or "GAB" lines, and "one-on-one" conversations.[1]

[1] In some cases, the services consist of recorded messages with an option for the caller to "cut through" to a live conversation. Other services involve messages left by the caller. Some

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Chat or GAB (for "group access bridging") lines connect two or more (up to eight) callers in much the same manner as old-fashioned party lines and newer conference calls do, though using advanced "group bridging" technology. Association members ("Information Providers") provide information and entertainment services using interactive group bridging equipment; one member is a manufacturer of the equipment and supplier of related software. Chat line callers share various common interests. For example, Association members offer chat lines for sports fans, senior citizens, teenagers, callers interested in religious fellowship and other interest groups, as well as lines for adult sexually oriented conversation. Chat lines often are used by people who are lonely or unable to move freely outside the home, and are dependent on the telephone for communicating with other persons. For example, chat lines are usable and used by AIDS victims and other disabled persons. Typically, calls are monitored by a moderator employed by the Information Provider, who enforces guidelines for the particular chat line, disconnects disruptive callers, transfers callers from group to group, and may help initiate the conversation.

Live one-on-one services are basically of two types. One connects the caller to an Information Provider's employee, and the two carry on a personal conversation

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Association companies also offer videotext services. Callers to these services record their own written messages, by personal computer or similar device. Videotext services can offer live interaction but do not provide live conversation. Nor do they involve messages recorded by the company. Callers "converse" using their own messages.

on the topic the caller desires. The other connects two callers to each other, with no company employee remaining on the line.

The conversation on live lines is spontaneous, and some callers wish to converse in sexually explicit terms. Callers to live services do not want "canned" taped messages, but seek responses to their own thoughts and feelings; they want a conversation with someone who is listening and able to respond with nuance, understanding or humor. Callers to "adult" one-on-one and chat lines find value in being able to speak anonymously on intimate and sexual subjects.

The public demand for these live telephone services is great. Contrary to the intimation in the government's brief that "two-way communications" may not constitute a "substantial portion of Section 223(b)'s applications" (Gov. brief at 23, n. 15), in 1987 there were approximately 37,000,000 live 976 calls carried by Pacific Bell in California alone, significantly more than the approximately 29,000,000 calls to recorded "adult" programs.[2] This huge

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[2] *See* Application 88-04-004 (filed April 1, 1988, before the California Public Utilities Commission), "In the Matter of Application of Pacific Bell, a corporation, for Authority to Establish a Tariff Schedule for Information Calling Services," Hearing Exhibits 7 and 10 (data supplied by Pacific Bell and received into evidence). Pacific Bell reported that it billed $37.914 million in revenue from what it characterized as "talk" plus "adult live" calls in 1987, as compared to $29.953 million in recorded "adult" calls. Assuming that the revenue is derived from $2 calls, the number of billed calls would be one-half of the revenue dollars. But *Amicus* companies estimate that the total number of calls to 976 numbers in California is roughly double the number of *billed* calls; *Amicus* companies

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demand for live telephone services reflects a human need that cannot be met in other ways.[3] Individuals in great numbers are making choices to use their telephone, in their own home, to discuss matters of interest to them with other individuals willing to converse anonymously.

Contrary to the Government's assertion that live telephone conversations are "not at issue" in this case (Gov. brief at 6, n. 3), the statute expressly reaches live as well as recorded telephone speech, forbidding communications made not only by "recording device" but *"directly."* *Amicus* therefore has a vital interest in the issues before the Court, an interest different from that of Sable Communications. Sable's case involves *recorded* telephone messages, in which the caller listens to sexually explicit tapes. But the statute, 47 U.S.C. sec. 223(b), encompasses *live* telephone conversations as well. Further, it subjects

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are paid for only about one-half of the 976 calls they receive: intrastate calls. Like other Bell Operating Companies, Pacific Bell does not bill for calls made to 976 numbers from out-of-state. While the actual number of calls cannot be precisely quantified, two things are clear: (1) the volume of *live* calls is huge, and (2) the volume of such calls *exceeds* the volume of recorded adult calls. One Association member conservatively estimates that in 1987 it handled at least 30,000,000 live calls nationwide.

[3] Lest the government respond that this need is somehow illegitimate, the sheer number of calls to live information services strongly indicates the contrary. Live telephone services appear to answer a basic human need to discuss, among other things, sexual subjects in the anonymous privacy of the caller's home. Of course, the statute here criminalizes pure speech, not illegitimate conduct like the sale of illegal drugs.

to criminal liability both making an obscene or indecent statement and *permitting*, "for commercial purposes," any such statement to be made on the telephone.

"Adult" entertainment services offered by Association members often do involve the use of sexually explicit language.[4] Because they involve pure speech among adults who have chosen to participate in these human interactions, these sexually oriented conversations are, *Amicus* believes, socially useful and responsive to real needs, and suppressing this speech does not fall within any legitimate government interest. Association members also offer services that involve sexually explicit conversation for purposes that are not primarily entertainment. For example, on chat lines for persons interested in prevention of sexually transmitted diseases like AIDS, sex inevitably is a subject of the conversation. *Amicus* believes that such conversations are socially and psychologically useful, and even therapeutic for many callers.

Amicus also wishes to call to the Court's attention facts regarding the technological and economic feasibility

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[4] The Government's persistent use of the slogan "dial-a-porn" does not advance analysis. The slogan certainly is not descriptive of the services offered by *Amicus* companies. Nor does it have meaning in law: What is simply pornographic is not legally "obscene" under *Miller* v. *California*, 413 U.S. 15, 18, n. 2 (1973). The government seems to use "dial-a-porn" as a shorthand argument that any mention of sex on a 976 line is "pornographic" and therefore obscene. The government's talismanic use of "dial-a-porn" is no substitute for the necessary constitutional analysis.

of various techniques for preventing children from being exposed to sexually explicit telephone communications.

SUMMARY OF ARGUMENT

The Court has never held that government may make criminal the sexual content of an individual's live conversation with another individual. The statute involved here, 47 U.S.C. sec. 223(b), is unconstitutional insofar as it criminalizes statements made in a live telephone conversation between persons who wish to speak to each other. The statute broadly proscribes speech. Moreover, it proscribes speech in which there are significant privacy and associational interests: telephone conversations between individuals.

The statute makes criminal the utterance of both "obscene" and "indecent" statements, but it defines neither. The offending sexual conduct is not "specifically defined" by the statute, as required by *Miller* v. *California*, 413 U.S. 15 (1973). The test of "indecent" speech used in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), can be applied only in the context of broadcast regulation, not in a criminal statute governing live telephone conversations. The test of "obscene" speech established by *Miller* would be nonsensical if applied to live telephone conversations: a conversation is not a relatively fixed "work" in the sense used in *Miller*; while a conversation may not have "literary, artistic, political, or scientific value," it may have significant social, psychological and therapeutic value for the participants; and interstate conversations cannot validly be judged by "community standards" of a

community remote from the Information Provider's business, with the prosecution hinging on the fortuity – against which the company cannot guard – that a call (for which the company is not paid) is initiated by an out-of-state caller.

As a criminal statute applying to live telephone conversations between individuals, Section 223(b) fails to give fair notice of prohibited conduct and deters protected speech. The previous civil and regulatory sanctions were amended out of the statute, so it must satisfy the rigorous requirements governing criminal punishment of speech-related offenses. The lines between "indecent" speech and "decent" speech and between a protected human conversation and an "obscene" one are too elusive for a criminal statute.

The statute, as applied to live human conversation, is impermissibly vague and overbroad. It exceeds any legitimate government interest in preventing children and unwilling adults from being exposed to sexually explicit language. In the case of live, interactive telephone services, individual callers initiate the communications and converse on the subjects of their choice; unwanted calls do not intrude unannounced into the home.

The statute has a substantial number of impermissible applications. It suppresses a wide variety of sexually explicit speech between adults. It criminalizes personal conversations legitimately dealing with sexual matters. The government has no valid interest in outlawing or deterring conversations on topics like AIDS prevention and "safe sex."

Finally, any valid governmental interest can be served by a much more narrowly tailored statute. Various techniques can effectively prevent minors and unwilling adults from being exposed to sexually explicit telephone conversations. These include monitoring to disconnect callers who are too young and requiring credit card screening or access codes, as well as new technological solutions using central office "blocking," scrambling and "beep tones." The statute, however, imposes strict criminal liability regardless of an Information Provider's good faith implementation of these techniques.

ARGUMENT

47 U.S.C. SECTION 223(b), INSOFAR AS IT IMPOSES CRIMINAL LIABILITY FOR MAKING EITHER "INDECENT" OR "OBSCENE" STATEMENTS IN A LIVE TELEPHONE CONVERSATION BETWEEN INDIVIDUALS, VIOLATES THE FIRST AMENDMENT

Introduction – The Statute

As amended in 1988, 47 U.S.C. sec. 223(b) does the following:

1. eliminates Section 223(b)'s previous references to children and unwilling adults, thus criminalizing "indecent" or "obscene" telephone communication regardless of to whom the communication is made;

2. prohibits making an "indecent" or an "obscene" statement on the telephone not only by "recording device" but "directly" in live telephone conversation between individuals;

3. provides no definition of either "indecent" or "obscene" communication;

4. imposes solely criminal liability, unlike the regulatory measure involved in *FCC* v. *Pacifica Foundation*;

5. imposes criminal liability not merely on the person making the indecent or obscene communication but on anyone who *"permits"* such a communication by a caller;

6. in the case of Information Providers like *Amicus* companies, imposes liability not on someone who intrudes into the home with an unwanted call, but on the recipient of the call; and

7. imposes strict criminal liability regardless of good faith and diligent efforts by the Information Provider to screen out minors attempting to use the service.

In short, the statute is not a "sensitive tool" for regulating unprotected speech. *See Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). It is a crude and defective piece of legislation whose attempt to impose criminal liability for making or permitting an "indecent" or "obscene" statement in a live telephone conversation between individuals violates the First Amendment The statute, at least insofar as it criminalizes live human conversation, is impermissibly vague and overbroad.

A. The statute is impermissibly vague since it provides no definition of "indecent" or "obscene."

Section 223(b) proscribes both "indecent" and "obscene" communications, but it defines neither. This violates one of the fundamental tenets of sexual speech regulation: that the prohibited matter "must be specifically defined by the applicable [law] as written or authoritatively construed." *Miller* v. *California*, 413 U.S. 15, 23-24 (1973); *see New York* v. *Ferber*, 458 U.S. 747, 764 (1982).

The government acknowledges that Congress failed to define either type of felonious communication, but asserts that the legislative history shows that Congress must have meant to define "indecent" as the Court did in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and must have meant to define "obscene" as the Court did in *Miller* v. *California*, *supra*. Gov. Brief at 18. This is a very peculiar way to legislate. As Justice Scalia recently remarked, "Congress is elected to enact statutes rather than point to cases," and "unrestrained use of legislative history" is no substitute for valid legislation. *Blanchard* v. *Bergeron*, ___ U.S. ___ , No. 87-1485 (Feb. 21, 1989).

Even if the Court were inclined to "construe" Section 223(b) to include the definitions of the key terms as used in *Pacifica* and *Miller*, the definitions do not fit the context. Neither definition can be carried over from the context in which it was written to the prohibition of live telephone conversations.

1. *Pacifica's* Definition of "Indecent"

In *Pacifica*, the Court's plurality opinion upheld the FCC's definition of "indecent" for the purpose of broadcast regulation: "language that describes, in terms patently offensive as measured by contemporary community standards *for the broadcast medium*, sexual or excretory activities and organs, *at times of the day when there is a reasonable risk that children may be in the audience*." 438 U.S. at 732 (emphasis added).[5]

This definition cannot be transplanted to the context of live telephone conversation. *First*, "the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (invalidating statute prohibiting unsolicited mail advertising of contraceptives) (footnote omitted).[6] There is no

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[5] Ripping the *Pacifica* definition from its context, the government's brief here simply omits "broadcast" and the italicized time-of-day provision from its quotation of the *Pacifica* definition. Gov. Brief at 18. However, the government does acknowledge that *Pacifica* "would require an *extension* to reach this case." *Id.* at 22, n. 14 (emphasis added).

[6] The unsolicited advertisements in *Bolger* – "Plain Talk about Venereal Disease" and "Condoms and Human Sexuality" (463 U.S. at 62, n. 4) – might have been considered "indecent" by some recipients, especially those with religious scruples about contraceptives. The Court rejected the government's argument that the statute was needed to keep unsolicited sexual material out of the hands of children. *Id.* at 73-74.

more justification for criminalizing "indecent" live conversation than there is for banning "indecent" printed words.[7] As the only courts to have considered the issue have correctly held, "the *Pacifica* decision does not justify the regulation of indecent telephone messages." *Carlin Communications* v. *FCC*, 837 F.2d 546, 560 (2d Cir. 1988); *Roe* v. *Meese*, 689 F.Supp. 344, 346-47 (S.D.N.Y. 1988); *Sable Communications* v. *FCC*, 692 F.Supp. 1208, 1209 (C.D.Cal. 1988).

Second, the *Pacifica* definition was expressly linked to both the broadcast medium and to a regulatory determination that offensive language should not be used at a time of day when children might be listening. There was no thought that even "indecent" speech could be *totally* barred from the airwaves. Rather, the Court found no right of an "intruder" – the radio broadcast – to thrust itself into the home at a time when children would be in the audience. 438 U.S. at 748-49.

Subsequent cases appropriately have read *Pacifica* as confined to its facts. For example, the courts have invalidated statutes attempting to extend bans on "indecency" to cable television, reasoning that parents can choose

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[7] Indeed, there is less justification, as virtually all publications – including major national newspapers – are now printed using electronic means, many over telephone wires. *See In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5053-54 & n. 188 (Aug. 6, 1987). The government has not suggested that it has any legitimate interest in banning "indecent" words in print, regardless of their availability to children. In *Syracuse Peace Council*, involving the "fairness doctrine," the FCC concluded that "the role of the electronic press in our society is the same as that of the printed press," and that content-based regulation is acceptable in neither. *Id.* at 5057.

whether to subscribe to a cable service and can exercise control to prevent their children from watching programs with sexual content. *See Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah* v. *City of Roy*, 555 F. Supp. 1164 (D. Utah 1982). In *Wilkinson* v. *Jones*, 107 S.Ct. 1559 (1987), the Court summarily affirmed the Tenth Circuit's decision to the same effect, *Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986). The present statute strays even farther afield from *Pacifica*: not only is there no broadcasting "intrusion" into the home, but Section 223(b) broadly prohibits mature adults from conversing on a wide variety of sexual topics.

Finally, *Pacifica* merely imposed a regulatory sanction on a government licensee. It did not involve a criminal statute of general application to all citizens, proscribing "indecent" language in conversation with other people and imposing severe penal sanctions. *Pacifica* did not empower the federal government to police blunt language in private telephone conversations between individuals. The line between "indecent" conversation and "decent" conversation is far too elusive for use in a criminal statute. *Cf. City of Houston* v. *Hill*, 107 S.Ct. 2502, 2510, n. 11 (1987); *Board of Airport Commissioners* v. *Jews for Jesus*, 107 S.Ct. 2568, 2573 (1987) (line too "murky"); *Kolender* v. *Lawson*, 461 U.S. 352, 359, n. 8 (1983); *Stanley* v. *Georgia*, 394 U.S. 557, 566 (1969) ("The line between transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.").

2. *Miller's* Definition of "Obscene"

It would be nonsensical to apply the *Miller* definition to a live telephone conversation of the kind offered by *Amicus* companies. It simply does not fit the context. *Miller* was decided a decade before the technology used by the *Amicus* companies even existed, and was addressed to a very different kind of communication.

First, a conversation between two people on the telephone is not a "work" in the sense used by *Miller*. The legal definition of obscenity was intended to deal with relatively fixed presentations – films, photographs, magazines, books or even performances – not with spontaneous, unrehearsed talk. Thus, it makes no sense to speak, in the context of live chat line or one-on-one services, of "the work, taken as a whole . . . ."

Second, as applied to telephone conversations like those offered on chat lines and one-on-one services, the *Miller* test fails to recognize constitutionally protected values. For example, a chat line conversation among AIDS victims may not be a "work" having "serious *literary, artistic, political or scientific value.*" 413 U.S. at 24 (emphasis added). But it might have very significant social, psychological and therapeutic value to the conversants, and there is no basis for according less weight to such value than to matters of taste like literary and artistic value. *Cf. Pope* v. *Illinois*, 107 S.Ct. 1918, 1923 (1987) (Scalia, J., concurring: *"De gustibus non est disputandum"*).

Finally, as Sable Communications has urged in this case, *Miller* requires reference to local community standards, and does not permit the government to prosecute

someone for making statements that are offensive in only the most conservative and sexually orthodox communities. Yet here the government's argument would allow prosecution under Utah or Mississippi community standards of a local 976 San Francisco "chat line" service called by someone in those states. The Information Provider would be judged under the standards of the remote and rural Utah or Mississippi community even though it is not physically present and does not advertise in the community, and even though it derives no revenue from out-of-state 976 calls. Imposing criminal liability would be a perversion of the *Miller* reasoning, which recognized and allowed for the diversity of sexual opinions and mores in our Nation. As Justice Harlan feared, it would present "the very real danger of a deadening uniformity which can result from nation-wide federal censorship." *Roth* v. *United States*, 354 U.S. 476, 506 (1957).[8]

B. As a criminal statute applying to telephone conversations, section 223(b) fails to give fair notice of prohibited conduct.

Section 223(b), with or without the *Pacifica* and *Miller* definitions, violates familiar and long established principles of criminal legislation, particularly laws restricting speech:

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[8] In arguing for a "national" standard in the face of *Miller's* contrary requirement, the government repeatedly characterizes the telephone as an "inherently national medium." But the telephone is *less* nationally pervasive than television and radio and no more "national" than movies and books, all of which are generally aimed at a national market. The government offers no persuasive reason why local community standards should govern all media except the telephone.

> "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . .Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'"

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (citations omitted); *see Kolender* v. *Lawson*, *supra*, 461 U.S. at 357, 359, n. 8. Section 223(b), as applied to live telephone conversations, fails to give "fair notice" of what is prohibited, and therefore violates due process of law. *Ibid.*[9]

This vagueness creates very serious problems for a company that, for example, offers a "chat line" for persons who share a common interest in discussing "safe sex" or, indeed, any adult conversation involving sex. Short of going out of business, the company cannot safely "steer clear" of unlawful conduct under Section 223(b). It cannot avoid prosecution by requiring its monitor to instruct participants not to say anything "indecent" or "obscene." Even if the monitor reads from the Court's *Pacifica* and *Miller* decisions, it is wholly unrealistic to expect the average person – as opposed to, say, the calculating and well-counseled radio or television station, or a

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[9] *Accord*, *Winters* v. *New York*, 333 U.S. 507, 515 (1948); *cf. Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1971) (vagrancy ordinance). The Court's decisions invalidating statutes of which persons of ordinary intelligence must guess at the meaning consistently emphasize the inappropriate use of the criminal sanction in speech regulation, for fear that protected speech will be deterred.

businessman who may wish to traffic in sexually graphic films[10] – to appreciate the nuances of complicated legal proscriptions and act on them. If the monitor actually uses the "Filthy Words" from the George Carlin monologue to illustrate what might be considered "indecent," the company might be prosecuted for that alone. And it is hopeless to pretend that either the company conversationalist or the callers will be able to make the crucial distinctions between talk that is "obscene" (carrying very heavy criminal penalties), talk that is merely "indecent" (carrying less severe penalties) and talk that may be sexually explicit or coarse but is permissible.

Since the company is subject to felony prosecution even if it only "permits" an indecent or obscene statement to be made (including in one-on-one services where no company employee remains on the line), the only way to "steer clear" of the prohibited zone is to go out of business. This may be precisely what the statute's proponents intended. Yet this would deprive a great many Americans of the opportunity to use the telephone in the privacy of their homes to discuss, anonymously but with other persons sharing similar interests, *anything* in "indecent" language, including politics, religion or intimate sexual topics.

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[10] The radio or television station, and the purveyor of films, can seek legal advice in advance of broadcasting or marketing their products. But no attorney advising a "chat line" service could possibly – without unacceptable malpractice exposure – give an opinion that future live conversations will not be found "indecent" or "obscene." At the very least, any advice would have to be so conservative as to result in deterring large amounts of protected speech.

Nor is it irrelevant that government enforcement of this criminal statute inevitably will involve either wiretapping or participation by government agents in live telephone conversations. Unlike the situation with recorded messages, enforcement of Section 223(b)'s prohibitions on "directly" making indecent or obscene statements brings Big Brother into countless homes to listen in on individuals discussing highly personal matters – matters into which the government has no business intruding.

By authorizing a prosecution whenever an Information Provider "permits" indecent or obscene communications, the statute also all but invites sabotage operations by competitors or vigilante groups intent on putting the company out of business, by subjecting it to a prosecution too costly to defend. For example, a saboteur could deliberately call an Information Provider's chat line and make indecent or obscene communications. The Information Provider would be subject to prosection even if it had, after the fact, disconnected the caller as quickly as possible.

C. The statute's prohibitions exceed any legitimate government interest.

The Court has never held that government may make criminal the sexual content of an individual's conversation with another individual. Section 223(b), however, imposes criminal liability not only for playing taped messages to callers but also for making communications

"directly" in live telephone conversation between individuals.[11]

The only interest that the government asserts in support of the amended Section 223(b) is protecting *children* from offensive sexual language accessible by telephone. Gov. brief at 19. But the statute sweeps far beyond this interest, criminalizing a wide variety of adult speech in which the government has no legitimate interest.

Indeed, the 1988 amendments to the statute eliminated all reference to minors or unconsenting adults, thus making it criminal to utter an "indecent" statement to a consenting adult. This is not a case of a sound truck or a broadcast that cannot be silenced without hearing the offending message. Nor is this a case in which unwanted telephone calls intrude unannounced into the home. The statute here imposes liability for communications made in calls initiated by consenting adults. Indeed, it imposes liability on the Information Provider when it "permits" an offending statement to be made by *the caller* in a conversation with another person.[12] And it imposes liability regardless of diligent efforts by the company to

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[11] No one contends here that government may not criminalize obscene telephone calls made to an unwilling recipient. *See, e.g.*, 47 U.S.C. sec. 223(a); Calif. Penal Code sec. 653m. Liability for this kind of telephonic assault, intruding unannounced into the unconsenting victim's home, is very different from the liability imposed by Section 223(b).

[12] This is true even for the type of "one-on-one" service in which the Information Provider merely connects two callers and no company employee remains on the line.

screen out minors, to warn callers about sexually explicit language or to disconnect disruptive callers.

Thus the statute reaches far beyond any legitimate interest in protecting children and unwilling adults from hearing sexually explicit language.[13] The government attempts to justify its overreaching by asserting that the only way to protect all children from hearing adults talk about sexual matters is to censor the adults' telephone conversations. Gov. brief at 13, 32-36. First, the argument is unfair. There is no way to protect *all* children from anything. (Indeed, children have been known to penetrate sophisticated computer defenses to gain access to national security information.) Just as the government's response to the known (and arguably greater) evils of alcohol and cigarettes is regulation and not prohibition, so in the area of pure speech the appropriate response to the potential harm of explicit sexual talk is reasonable regulation and not banning all such talk.

Second, the argument is factually incorrect. There are new and effective technological means to permit parents to contain their children's curiosity. *See* point E, *infra*. In addition, monitors employed by Information Providers can screen out children. *Ibid*.

Because, with reasonable safeguards, the live, interactive telephone services offered by *Amicus* companies are not readily accessible to children, suppressing the speech used in their services does not fall within any

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[13] It should also be remembered that any federal (as opposed to state) interest in policing obscenity in general is "attenuated" because "Congress has no substantive power over sexual morality." *Roth* v. *United States*, *supra*, 354 U.S. at 504 (Harlan, J.).

legitimate government interest.[14] The government identifies *no* interest in denying to willing adults the right to converse person-to-person on any subject they wish.[15]

D. The statute has a substantial number of impermissible applications.

Section 223(b) broadly proscribes certain forms of speech, not conduct. Moreover, it proscribes speech in

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[14] Congress of course has power to regulate the telecommunications industry. But in 1988 Congress eliminated Section 223(b)'s previous regulatory and civil sanctions, so the statute before the Court must stand or fall not as a reasonable regulatory measure but a criminal law prohibiting certain forms of speech.

[15] To the extent that the federal government has a valid interest in suppressing indecent and obscene telephone communications, Section 223(b) is so underinclusive as to be arbitrary and capricious. Section 223(b) reaches only "interstate" calls, while the overwhelming number of sexually oriented calls for commercial purposes are *local* calls, usually offered on the 976 exchange prefix. For example, in only nine states can a 976 number be accessed by an interstate call; in the other states either there is no 976 service or the numbers are completely blocked from interstate calls. Those companies offering 976 adult oriented telephone information services would promptly be out of business if they had to rely on interstate calls, because they are paid by the local Bell Operating Company only for calls made in a "local access and transport area" (LATA), except in California where Information Providers are paid on intrastate interLATA calls but not interstate calls.

Whether an Information Provider is subject to prosecution in the states where it can receive interstate calls depends on the fortuity – against which the company cannot guard – of whether someone calls its service from another state.

which there are significant privacy and associational interests: telephone conversations between individuals. Citizens of course have a privacy interest in having sexual material, even obscene material, in their own homes. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). *Stanley* "was firmly grounded in the First Amendment." *Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986). Further, the Court has long recognized that people have a "reasonable expectation of privacy" in speaking over the telephone. *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

Insofar as the statute criminalizes statements made in live human conversation over the telephone, it is overbroad, with a substantial number of impermissible applications. *See Board of Airport Commissioners* v. *Jews for Jesus*, *supra*, 107 S.Ct. at 2571-72; *City of Houston* v. *Hill*, *supra*, 107 S.Ct. at 2508; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). For example, speech on "chat lines" and live "one-on-one" conversations offered by *Amicus* companies is protected, whether it is considered entertainment or simply explicit sexual talk. Nor does the government have any legitimate interest in suppressing frank conversations about, for example, prevention of AIDS, "safe sex" and the proper use of condoms, in which sex is *the* subject. This is "material legitimately treating with sex," not unprotected speech. *Cf. Pinkus* v. *United States*, 436 U.S. 293, 300 (1978), quoting *Roth* v. *United States*, *supra*, 354 U.S. at 489. An unwilling listener – or a juror in a criminal prosecution – might deem blunt sexual language "indecent" or even "obscene."[16] But adequate screening of chat

[16] Indeed, the United States Senator who was the principal proponent of the amendments to Section 223(b) declared that

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lines excludes unwilling listeners and minors. Users of the chat lines find real psychological or therapeutic value in being able to discuss intimate matters anonymously, with other individuals who share the same perspective or interests.

Contrary to the government's suggestion that there are "alternative" means for adults to enjoy recorded messages (Gov. brief at 34), there is no comparable substitute for individuals who wish to participate anonymously in conversations with other individuals about intimate subjects. The telephone, in the privacy of one's home, uniquely offers this opportunity.[17]

E. A more narrowly tailored statute would satisfy any legitimate government interest with regard to live telephone conversations.

As noted above, the only interest asserted by the government is preventing children from being exposed to

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written "safe sex" educational materials were "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987) (statement of Sen. Helms). It is true that Senator Helms' statement was made in the context of supporting legislation to ban federal funding of such materials rather than to criminalize them. But if a prominent legislator believes that such materials are appropriately called "obscene," it is not farfetched to suggest that prosecutors and jurors will have similar reactions.

[17] The absurdly broad reach of the statute is illustrated by the fact that it would make criminal a psychiatric patient's bluntly sexual telephone conversation with his therapist, and an Information Provider's telephone conversation with its lawyer about the kinds of communications used in the services offered by the company (since both therapist and lawyer are engaging in the communication "for commercial purposes"). Though these examples seem farfetched, they fall within the literal terms of the statute. —

indecent or obscene telephone messages. The government points to the ubiquity of telephones and the assumed ease of dialing as support for its claim that only a complete ban on such messages can serve this interest. In fact, however, this interest can be served by a statute that is much more narrowly tailored.

There are a variety of means that currently are used and can be used to make it virtually impossible, without the complete cooperation and encouragement of their parents, for children to hear live, interactive, sexually explicit telephone conversations. One or more of these means would satisfy the governmental purpose without outlawing a wide range of speech by mature adults. Their use should provide a defense to criminal prosecution.

1. Monitoring

Unlike recorded message services, live telephone services typically employ monitors. Before a caller is allowed to participate in either a chat line or one-on-one conversation, he or she can be required to speak first to the monitor. The monitor may warn the caller of the sexual nature of the particular service. The monitor may also be instructed to disconnect any caller who sounds too young (for example, a caller whose voice sounds childlike or adolescent and who cannot instantly recite his year of birth showing his majority). *Cf. Butler* v. *Michigan*, 352 U.S. 380, 383 (1957) (less restrictive means available at point of sale, by requiring booksellers to sell only to adults).

2. Credit Card Screening

In compliance with earlier FCC regulations (*see Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546, 549 (2d Cir. 1988)(*"Carlin III"*), several live information and entertainment services require payment by credit card before the caller is allowed to participate. The obstacles that this presents for children are formidable. The caller must get through elaborate screening by a company employee. Typically, the caller must not only give the credit card number and expiration date but also the issuing bank name or number; this information does not come through on credit card receipts but is on the actual card. The caller is asked the number of the telephone called from and under whose name it is listed. Then the caller is asked for his Social Security number and driver's license number. If the caller does not have the information, he is disconnected. If he gets this far, he is asked his date of birth, which of course has to demonstrate that he has reached majority. (If a minor has acquired his father's card and is impersonating his father, he must think quickly of his father's date and year of birth.)

During this questioning, the company reaches the card-issuing bank by computer and verifies information about the card holder. The company also simultaneously calls the telephone number given by the caller, to verify that it is busy (and that the caller is not using someone else's phone or a pay phone). Alternatively, the company may call directory assistance to verify the name and number. Even if the minor somehow survives this screening, if his voice and manner seem too young to the monitor, he is not allowed to participate.

Screening like this, while mostly aimed at preventing credit card fraud, makes it practically impossible for a child, without parental collusion, to participate in a live telephone service of the kind offered by *Amicus* companies. *Amicus* companies have experienced a substantial reduction in call volumes when they use credit card screening. Many potential callers refuse to sacrifice their anonymity to anyone but the local telephone company for its billing purposes. In addition, the transaction costs associated with this type of screening are substantial and require much higher charges to callers, which also explains the drastic call volume reduction. However, even with these drawbacks, credit card screening is a significantly less restrictive approach to excluding minors than a complete ban like Section 223(b).

3. Access Codes

Also in compliance with earlier FCC regulations (*see Carlin III, supra*), some providers require an access code or personal identification number before being able to participate. This again entails elaborate screening much like that used for credit cards, with all the drawbacks of credit card screening and, in addition, a written application by the prospective caller. Once again, *Amicus* companies that have experimented with access codes have experienced major reductions in call volumes, which they attribute principally to the loss of caller anonymity.

4. Blocking

"Blocking" certain lines is of two kinds: "central office blocking" and "customer premises blocking." The

information on which the FCC based its rejection of both as a reasonable solution for families who wish to eliminate the possibility of their children dialing "adult" telephone services (*see Carlin III*) is out of date as to central office blocking. *See, e.g., Fabulous Associates, Inc.* v. *Pennsylvania Public Utility Commission*, 693 F.Supp. 332, 339 (E.D. Pa. 1988) (PUC tariff effective August 1, 1988, provides for central office blocking). In the past two years, *Amicus* has ascertained, local Bell Operating Companies around the country have established, with the approval of the state public utility commissions, tariffs providing for central office blocking. Many local carriers now offer their customers central office blocking at no or minimal cost.

Blocking affords families the option of preventing their telephones from being used by their children to reach undesired services.[18] It gives parents substantial control. If parents fail or refuse to exercise appropriate supervision of their children, it is not the government's role to step in with criminal legislation that outlaws or deters a substantial amount of speech among mature adults. *See Fabulous Associates, Inc.* v. *Pennsylvania Public Utility Commission, supra*, 693 F.Supp. at 339, n. 14.

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[18] Pay phones are easily programmed, and almost all already are programmed, to block calls to Information Providers on 976 and 900/700 numbers, so children would not be able to circumvent parental control by using them.

5. Scrambling

As noted in *Carlin III*, scrambling technology is available. Telephone services can scramble calls made to their lines, and only callers who purchase a descrambling device are able to use the service. This gives parents another option to prevent their children from using their telephones to participate in "adult" telephone conversations.

6. Beep Tone Technology

As also noted in *Carlin III*, telephone services could use electronic beeps at the outset of each call. These beeps would disconnect any telephone equipped with a beep tone device. *Amicus* understands that in the past year there have been additional developments indicating the promise of such a device for giving parents still another option for preventing their children from making undesired calls.

In short, there are readily available techniques for serving the government's purpose, especially with regard to live, interactive telephone conversations. Section 223(b), as written, is crudely defective legislation that cannot constitutionally be applied to the kinds of telephone services offered by the *Amicus* companies.

CONCLUSION

For the reasons stated, the order of the district court should be affirmed insofar as it enjoins enforcement of the statute prohibiting "indecent" speech and reversed insofar as it declines to enjoin enforcement of the statute prohibiting "obscene" speech. Even if the Court were to affirm the order as to obscene recorded messages, the Court should make clear that the statute may not be invoked to prohibit either indecent or obscene speech in live telephone conversations between individuals.

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Respectfully submitted,

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